



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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April 6, 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

SUBJECT: Draft AO 1994-5

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for April 14, 1994.

Attachment

AGENDA ITEM
For Meeting of: APR 14 1994

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4 **ADVISORY OPINION 1994-5**

5 **William D. White**
6 **16 E. Manilla Avenue**
7 **Pittsburgh, PA 15220**

DRAFT

8 **Dear Mr. White:**

9 **This responds to your letters dated March 12 and March**
10 **2, 1994, which request an advisory opinion concerning**
11 **application of the Federal Election Campaign Act of 1971, as**
12 **amended ("the Act"), and Commission regulations to your**
13 **status as a 1994 candidate for the United States Senate in**
14 **Pennsylvania.**

15 **You state that you have publicly announced your intent**
16 **to be a candidate in Pennsylvania for the 1994 U. S. Senate**
17 **election cycle. Your announcement was made on or about**
18 **November 5, 1993, and you filed a Statement of Candidacy (FEC**
19 **Form 2) which was stamped as received by the Secretary of the**
20 **Senate on December 15, 1993. With this filing you also**
21 **submitted a Statement of Organization (FEC Form 1)**
22 **designating your principal campaign committee under the name**
23 **"Bill White for U.S. Senate." This statement identifies you**
24 **as the treasurer and the chairman of the committee. It**
25 **further indicates that the committee does not have any bank**
26 **account or other depository account to receive, hold, and**
27 **disburse committee funds.**

28 **Your request explains that you will be seeking office as**
29 **an independent (no political party affiliation) in the**
30 **November 1994 general election. You expect to obtain ballot**

3 access in the general election by gathering the "nominating
4 signatures" of qualified electors on "Nomination Paper" forms
5 prepared by Pennsylvania election officials. You expect to
6 begin circulating these forms as soon as allowed under state
7 law, and you believe the circulation period began on March 2,
8 1994. You also assert that you meet all applicable
9 requirements of the United States Constitution with respect
10 to qualifications for election to the office of U. S.
11 Senator.

12 You request an advisory opinion from the Commission
13 "determining if I am a legally qualified candidate for the
14 United States Senate within the meaning of 2 U.S.C. §431(2)."
15 You also ask whether an opinion to this effect supersedes
16 "any similar determination by any other State or Federal
17 Agency, and if these other agencies are legally bound by the
18 determination of the FEC on this matter."

19 The question of whether you are a candidate under the
20 Act and Commission regulations depends upon the amount of
21 financial activity by you or by any person, including a
22 campaign committee, you authorize to conduct campaign
23 activity on your behalf. When financial activity to
24 influence your election exceeds \$5,000 in either
25 contributions received or expenditures made, you are required
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to file as a Senate candidate.^{1/}

This means that you would become a candidate under the Act if you and your campaign committee, and any other person you authorize to conduct campaign activity on your behalf, receive a total amount that exceeds \$5,000 in contributions. Similarly, you would become a candidate under the Act if you, your committee, and any other person you authorize, make a combined total of over \$5,000 of expenditures to influence your election. 2 U.S.C. §431(2), 11 CFR 100.3(a).^{2/}

Conversely, you are not a candidate for purposes of the Act and Commission regulations if either your total of campaign contributions received, or your total of campaign expenditures made, does not exceed \$5,000 for the 1994 Senate election cycle.

If you are required to file as a Senate candidate, the

^{1/} For example, expenditures to influence your election would include amounts you spend from your personal funds (before you receive any contribution from any other person) to promote yourself for the general election ballot by seeking signatures on nomination petitions.

^{2/} Once you become a candidate under the Act, the first report required to be filed must include disclosure of all funds, including all contributions of money or other things of value, received by you or your committee or by other persons you authorized to conduct campaign activity. It must also disclose all disbursements for your campaign. 11 CFR 101.2(b), 101.3, 104.3(a), 104.3(b). Assuming you become a candidate under the Act in 1994, any receipts or disbursements made in 1993 for your Senate campaign would have to be disclosed in your first report, but should be submitted in a separate set of FEC forms filed at that time. This is because several disclosure categories require the filing of receipt and disbursement data with calendar year totals or aggregates. 11 CFR 104.3(a)(3), 104.3(a)(4), 104.3(b)(2), 104.8(b), 104.9(b).

3 required filings must be made with the Secretary of the
4 Senate, as custodian for the Commission. In addition, a copy
5 of each document in the filing must be filed with the
6 appropriate state office which is the Bureau of Commissions,
7 Elections and Legislation in Harrisburg, PA. The filing of
8 the Statement of Candidacy (FEC Form 2) which designates a
9 principal campaign committee must be made no later than 15
10 days after you become a Federal candidate. Within 10 days of
11 its designation by you, the principal campaign committee must
12 register by filing a Statement of Organization (FEC Form 1).
13 As noted above, you have filed these documents even though
14 you have not yet indicated that over \$5,000 of financial
15 activity has occurred with respect to your 1994 Senate
16 campaign.

17 Commission regulations explain that individuals who are
18 not required to file as candidates under the Act may
19 voluntarily register and file reports, but a person who does
20 so does not become a candidate solely by voluntarily filing.
21 11 CFR 104.1(b). This regulation is based upon 1979
22 legislative history explaining the intent of Congress when it
23 first prescribed the \$5,000 threshold for mandatory candidate
24 filing.^{3/} Addressing the \$5,000 candidate status threshold,
25 the report of the Committee on House Administration states:
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28 3/ Before 1980, each Federal office candidate, who took the
29 action necessary under State law to qualify for the ballot,
30 was required to file with the Commission regardless of the
amount of funds received or spent. 2 U.S.C. §431(b)(1)
(1976).

4 The purpose of the change in this definition
5 [of the term "candidate"] is to reduce the number
6 of candidates who are required to register and
7 report under the Act.

8 An individual does not become a candidate
9 until he or she has received \$5,000 or spent \$5,000
10 or a person authorized by the individual receives
11 \$5,000 or spends \$5,000 on behalf of the
12 individual.

13 * * * *

14 It is [the] clear intent of the Committee to
15 relieve individuals who do not meet the definition
16 of candidate of any registration and reporting
17 requirements under the Act even if such individuals
18 appear on the ballot. . . . [Appearance on the
19 ballot no longer creates a presumption that the
20 individual has a registration or reporting
21 obligation.

22 On the other hand, individuals who do not meet
23 the legal definition of candidate may file reports
24 voluntarily. The Clerk, Secretary, or Commission,
25 as appropriate, must make any report voluntarily
26 filed with it public. However, an individual who
27 is voluntarily filing a report is not subject to
28 the nonfiling provisions of this Act until he or
29 she becomes a candidate. * * *

30 H. R. Rep. No. 96-422, 96th Cong., 1st Sess. 5,
(1979).

As the foregoing discussion and citations indicate, the
Commission does not make any determination of the type you
have requested; namely, whether you are a "legally qualified
candidate" for Federal office. The Act and the Commission do
require that if you become a Federal candidate by virtue of
receiving over \$5,000 in campaign contributions or making
over \$5,000 in campaign expenditures, as more fully described
above, you must file as a candidate in a timely manner and
must otherwise comply with all provisions of the Act and
Commission regulations.

You also ask whether Commission determinations of a

3 person's candidacy for Federal office are binding on other
4 State or Federal Government agencies. The Commission notes
5 that the fact one is a candidate under the Act does not
6 determine his or her qualifications for the election ballot
7 in any State. Ballot access requirements are governed by
8 State law, assuming such law comports with the requirements
9 of the United States Constitution as interpreted and applied
10 by the United States Supreme Court and lower Federal courts.
11 See, for example, Munro v. Socialist Workers Party, 479 U.S.
12 189 (1986); Anderson v. Celebrezze, 460 U.S. 780 (1983);
13 Lubin v. Panish, 415 U.S. 709 (1974); Jenness v. Fortson, 403
14 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23 (1968). The
15 Commission further notes that Federal preemption under
16 2 U.S.C. §453 does not extend to State ballot access
17 requirements. Commission regulations provide that state
18 laws, which prescribe the manner of qualifying as a
19 candidate, are not preempted or superseded by the Act or
20 Commission regulations. 11 CFR 108.7(c)(1).

21 You may also wish to review relevant provisions of the
22 Communications Act of 1934, as amended, that impose certain
23 duties on broadcast stations "to allow reasonable access to
24 or to permit purchase of reasonable amounts of time for the
25 [campaign] use of a broadcasting station by a legally
26 qualified candidate" for Federal elective office. 47 U.S.C.
27 §312(a)(7). Under some circumstances this statute also
28 requires broadcast licensees to give "equal opportunities"
29 for use of its station to "a legally qualified candidate" for
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any public office. 47 U.S.C. §315(a). These provisions are interpreted in the rulings and regulations of the Federal Communications Commission, not by the Federal Election Commission.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

For the Commission,

Trevor Potter
Chairman